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No. 91-733

FILED
JAN 30 1992
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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RANDY ARDEN FRIEOUF, PETITIONER

*v.*

UNITED STATES OF AMERICA
AND FARM CREDIT BANK OF WICHITA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, in light of petitioner's contumacious conduct and violation of court orders, the bankruptcy court properly dismissed petitioner's Chapter 11 case with prejudice under 11 U.S.C. 349(a) and denied petitioner a discharge of the debts at issue in this case for a three-year period.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A30) is reported at 938 F.2d 1099. The district court (Pet. App. A30-A39) and bankruptcy court opinions (Pet. App. A40-A62, A62-A69) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 10, 1991. The petition for a writ of certiorari was filed on October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On September 20, 1985, petitioner filed a petition under Chapter 11 of the Bankruptcy Code. Pet. App. A3. For nine months after the petition was filed, petitioner did not submit a plan of reorganization. When he did submit his plan, petitioner failed to accompany it with the disclosure statement required by 11 U.S.C. 1125(b). Pet. App. A40. The bankruptcy court ordered petitioner to file a disclosure statement by August 20, 1986. Petitioner failed to do so. *Id.* at A5.

In June 1987, the Federal Land Bank of Wichita (FLB) filed a motion to dismiss, citing, among other grounds, petitioner's failure to file a disclosure statement or to prosecute this matter diligently. After the bankruptcy court set a hearing on that motion, petitioner filed an amended plan of reorganization and disclosure statement on September 15, 1987. FLB's motion was withdrawn without prejudice, and a hearing was set to consider approval of the disclosure statement. The hearing was held on December 8, 1987, and petitioner was ordered to amend his statement within thirty days. FLB was to have ten days to review the amended statement. If there were no objections, an agreed order was to be presented to the court. No agreed order was submitted. Pet. App. A6.

Respondent Farm Credit Bank (FCB), FLB's successor,[1] then renewed its motion to dismiss. Confronted with that motion, on November 17, 1988, petioner filed an amended disclosure statement and a third plan of reorganization. On December 13, 1988, the bankruptcy court denied FCB's motion, again

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[1] FLB had merged with the Federal Intermediate Credit Bank of Wichita to form respondent Farm Credit Bank. See Farm Credit Bank Br. in Opp. 2.

without prejudice, and approved petitioner's disclosure statement as modified. A hearing on confirmation of the plan was set for January 25, 1989. Pet. App. A7-A8.

At the January 25, 1989, hearing, the court learned that petitioner had never mailed his plan of reorganization nor his disclosure statement to creditors. The court then took FCB's renewed motion to dismiss under advisement and allowed petitioner time to file a response. Pet. App. A8.

2. On February 14, 1989, the bankruptcy court entered an order concluding that dismissal with prejudice was warranted. Pet. App. A40-A62. The court noted that petitioner and his counsel had made "little or no apparent effort * * * to formulate a confirmable plan of reorganization," and observed that "the only plans which have been filed have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding." *Id.* at A50. The court rejected petitioner's contention that his "numerous failures to comply with orders of the court" resulted from misunderstandings, commenting that such misunderstandings "would only be possible if counsel were unable to communicate in the English language." *Id.* at A57-A58. Noting "the almost unbelievably lengthy record of proceedings in this case," the court concluded that the requirements for a dismissal with prejudice were satisfied. *Id.* at A60. But because the court had previously indicated that it did not believe that such a dismissal was warranted, the court gave petitioner a final opportunity to show cause why a dismissal with prejudice should not be entered. A hearing was set for February 28, 1989. *Id.* at A61.

Petitioner failed to appear at the February 28 show-cause hearing.[2] The court accordingly dismissed the case with prejudice. Because petitioner had expressed his intention to refile under Chapter 12 if the Chapter 11 case were dismissed, the court also barred petitioner from filing any bankruptcy petition for three years. Pet. App. A62-A69.

3. The district court affirmed the bankruptcy court's order of dismissal, noting that the record reveals that petitioner's actions were "characterized by delay, inefficiency, dilatory tactics, failure to obey orders of court, and unprofessional and recalcitrant behavior." Pet. App. A33.

4. The court of appeals affirmed the dismissal with prejudice, holding that under 11 U.S.C. 349(a) the bankruptcy court has the power to deny "a debtor future discharge of debts dischargeable in that particular case." Pet. App. A16. After reviewing the bankruptcy court's factual findings, the court of appeals concluded that the record supported dismissal of the bankruptcy case with prejudice and the order making nondischargeable for three years the debts of petitioner that were dischargeable in this case. *Id.* at A27-A29. The court, however, reversed the bankruptcy court's denial to petitioner of all access to bankruptcy relief for three years. The court held that the bankruptcy court could not prevent a debtor from refiling a bankruptcy petition for more than 180 days, the time period contained in 11 U.S.C. 109(g).

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[2] Petitioner had sought to continue the show-cause hearing and had filed a motion, which failed to conform to local rules, seeking reconsideration of the bankruptcy court's February 14 order.

## ARGUMENT

1. Petitioner contends (Pet. 18-28) that the bankruptcy court lacked authority under 11 U.S.C. 349(a) to deny discharge of the dischargeable debts involved in this case for three years. That contention is incorrect, and petitioner makes no claim that the court of appeals' decision conflicts with the decision of another court of appeals. Further review is therefore not warranted.

Section 349(a) grants the bankruptcy court discretion to dismiss a case with prejudice. It states, in pertinent part, that:

> [u]nless the court, for cause, orders otherwise, the dismisal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed.

11 U.S.C. 349(a).[3] By expressly authorizing the bankruptcy court to bar the discharge of debts in a subsequent bankruptcy proceeding "for cause," the section creates an exception to the general rule that dismissal does not affect dischargeability. Giving the text its natural meaning, the court of appeals correctly found that Section 349(a) empowers the bankruptcy court to deny "a debtor future discharge of debts dischargeable in that particular case." Pet.

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[3] The section continues by stating: "nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in Section [109(g)] of this title." Petitioner does not contend, nor does the language of this provision suggest, that the 180-day time limitation in Section 109(g) applies to the portion of the section concerning dischargeability, which precedes the semicolon.

App. A16. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, that statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' "); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2199 (1991) ("In our view, the plain language of the Bankruptcy Code disposes of the question before us."). Thus, while reversing the bankruptcy court's denial of all access to the bankruptcy courts for three years, the court of appeals properly sustained, as a legitimate exercise of the bankruptcy court's power, the lesser sanction of rendering the debts that were dischargeable in this case nondischargeable for three years upon a finding that there was "cause" for that sanction.

Petitioner asserts (Pet. 22-23) that Section 349(a)'s purpose is to "prevent[] already non-dischargeable debts from being asserted in a subsequent proceeding." The plain language of the provision, however, refutes that claim; the provision applies to the discharge of "debts that were *dischargeable* in the case dismissed" (emphasis added). Nor is petitioner correct in arguing (Pet. 23) that the "for cause" reference in Section 349(a) limits the court to finding "cause" to deny dischargeability under 11 U.S.C. 1141, 11 U.S.C. 523, or 11 U.S.C. 727. If Congress had intended that result, it would have mentioned or otherwise identified those particular sections in Section 349(a), but there is no such cross-reference. Petitioner cites no evidence that those sections were intended to limit the court's independent power to require a dismissal with prejudice under Section 349(a) upon a sufficient showing of "cause."

It is no surprise that Section 349(a) does not take its content from the cited provisions, since none of them deals with dismissals. Section 1141, 11 U.S.C.

1141, describes the effect of confirmation of a plan. It does not apply where, as here, no plan was confirmed at all (which will often be true when a petition is dismissed for cause). Section 525, 11 U.S.C. 523, describes general exceptions to discharge of particular debts. It would be redundant to apply the standards of that section to the "cause" determination under Section 349(a); even without an order entered for "cause" under Section 349(a), items covered by Section 523 would not be dischargeable. Finally, Section 727, 11 U.S.C. 727, generally states that a discharge of debts shall be granted unless certain circumstances are shown; it does not speak to the issue of whether a debtor may be temporarily denied access to discharge when a dismissal of the petition is entered for cause.[4]

2. Petitioner also argues (Pet. 28-35) that the record in this case did not establish the bad faith needed to support the bankruptcy court's order. That fact-bound issue warrants no review here, and, in any event, the record supports the result in this case.

Petitioner failed to submit a disclosure statement for more than a year after the filing deadline set by the court. Pet. App. A41. He then submitted amended plans of reorganization only after creditors had filed motions to dismiss based on his failure to provide a feasible reorganization plan. *Id.* at A41-A44, A50. He disregarded a court order to submit an amended reorganization plan and disclosure statement to the creditors. *Id.* at A44-A45. He repeatedly failed to file monthly operating statements, despite

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[4] Even if Section 727 did apply in this case, it would not aid petitioner. Under Section 727(a)(6), discharge may be denied if "the debtor has refused, in the case—(A) to obey any lawful order of the court." Petitioner repeatedly did so here.

court orders. *Id.* at A46-A47. Finally, petitioner did not appear at a scheduled hearing to show why the case should not be dismissed with prejudice. *Id.* at A64. Against that background, the court of appeals did not err in finding the sanction imposed on petition to be fully warranted.[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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[5] In passing, petitioner suggests (Pet. 25) that his due process rights were infringed by the court of appeals' failure to order an additional hearing in the bankruptcy court on the issue of bad faith. The bankruptcy court, however, had already made factual determinations that the debtor disregarded court orders, failed to make required filings, and unreasonably delayed the case to the detriment of the creditors. Pet. App. A50, A56-A58. As the court of appeals correctly found, these factual findings, which petitioner had an ample opportunity to contest, were sufficient to support the dismissal with prejudice. *Id.* at A27.

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